No. 10,280

IN THE

# United States Circuit Court of Appeals

## For the Ninth Circuit

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Lydell Peck and Allan B. Ruddle,
*Appellants,*

vs.

Shell Oil Company, Incorporated (a corporation), and Shell Development Company (a corporation),
*Appellees.*

## APPELLEES' REPLY BRIEF.

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FILED
FEB - 9 1944
PAUL P. O'BRIEN,
CLERK

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## APPELLEES' REPLY BRIEF.

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### INTRODUCTION.

In violation of the Rules of this Court appellants have, *for the first time,* in their reply brief, set forth an argument in support of some of the points on appeal relied on by them. We refer mainly to point of appeal numbered XXI[1] relating to the alleged bias and prejudice of the trial Court. As pointed out in our former brief, appellants, in their opening brief, signally failed to advance any argument in support of this alleged error.[2] Ordinarily we would be content to leave such belated argument without

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[1]Tr. Vol. III, p. 1536.

[2]Note the statement on page 6 of the Brief for Appellants that they do not "abandon, *by failure to argue the same here* the contention of prejudice, bias and error on the part of the trial court * * *".

reply, confident that this Court would not give its sanction or approval to contentions and arguments advanced for the first time in a reply brief. However, the charges of bias and prejudice against his Honor, Judge Roche, are so serious and so without merit or foundation that as officers of the Court, if for no other reason, we are compelled to reply thereto.

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## I. THE TRIAL COURT WAS EMINENTLY FAIR AND JUST IN ITS TREATMENT OF COUNSEL AND THE PARTIES. CONSEQUENTLY APPELLANTS' TARDY CONTENTIONS IN THIS CONNECTION ARE WITHOUT MERIT.

### A. Appellants are foreclosed by their failure to take proper action in the trial Court from now asserting any alleged bias or prejudice.

Preliminarily it might be pointed out that appellants are unquestionably foreclosed from raising the question of alleged bias or prejudice for the reason that at no time during the trial of the cause below was any objection made to the remarks of the Court now objected to. While Rule 46 of the Federal Rules of Civil Procedure has made the taking of formal exceptions to rulings or orders of a trial Court unnecessary, it still requires that an aggrieved party make known to the Court the objection which he might have to its action. The essential function of an objection is to direct the trial judge to the point in which it is supposed he has erred, so that he may have an opportunity to consider it and change his ruling if convinced of error, and so that justice and mistrials due to inadvertent errors may thus be obviated.[3]

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[3]*Hazeltine v. Johnson*, 92 Fed. (2d) 866, 868 (CCA 9).

Likewise it was never intended by our Rules of Federal Civil Procedure, nor by any other rule of our Courts, that a party could sit supinely by and allow the trial Court to commit alleged errors without calling them to its attention, and then in the event of an adverse decision "spring a trap on the Court". It has always been necessary that an aggrieved party make his point clear and disclose the grounds of his objection fully.[4] This appellants wholly failed to do.

Under Section 21 of the Judicial Code (28 U.S.C. Sec. 25), it would seem to be apparent that if, as appellants now assert, the trial Court was biased and prejudiced against them it was incumbent upon them to have called such fact to the Court's attention immediately and to have requested transfer of the cause to another judge for hearing. In other words, as soon as the facts constituting the alleged bias and prejudice are known, an affidavit setting forth such facts must be filed or good cause shown for delay,[5] and it is much too late to make such charges after a case has been tried and a judgment entered.[6] No such action by appellants was taken in the Court below.

Although the foregoing would seem to be a complete answer to appellants' entire argument in this connection, it is unnecessary to rely on the foregoing grounds alone,

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[4]*Bucy v. Nevada Const. Co.*, 125 Fed. (2d) 213, 218 (CCA 9); *Drybrough v. Ware*, 111 Fed. (2d) 548, 550 (CCA 6); *Massachusetts, etc. Co. v. Preferred Automobile Co.*, 110 Fed. (2d) 764, 765 (CCA 6).

[5]*Chafin v. United States*, 5 Fed. (2d) 592, 595 (CCA 4); *Refior v. Lansing Drop Forge Co.*, 124 Fed. (2d) 440, 445 (CCA 6).

[6]*Ex parte Glasgow*, 195 Fed. 780.

as a brief discussion of appellants' complaints will completely demonstrate the complete lack of merit therein.

Appellants' charges of bias and prejudice and argument in support thereof are found on pages 33 to 46 of their reply brief. The vice of permitting an appellant to set forth alleged errors in his Statement of Points on Appeal, and not urge or argue them in his brief is quite apparent in the instant case when it is realized that although in their Statement of Points on Appeal appellants have listed some 45 instances of alleged bias and prejudice, they have been content in their reply brief to rely upon only *11* thereof. In addition, one of the alleged instances on which appellants rely as "indicative of the attitude of the court, even toward counsel" was not set forth in their Statement of Points on Appeal.[7] Consequently, under such circumstances, there can be no burden upon appellees except to reply to such instances of alleged bias and prejudice as are relied on by appellants in their brief and this we shall do.

**B. The trial Court, far from indicating any hostility or bias towards appellants or their counsel, was extremely tolerant and fair.**

The first instance of alleged bias and prejudice relied on by appellants are the remarks of the trial Court made during appellants' opening statement.[8] It is extremely difficult to ascertain the basis for appellants' complaint in

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[7]We refer to the statement appearing at page 45 of their reply brief, which is found on page 100 of the Reporter's Transcript. This page reference is not found in Statement No. XXI (Tr. Vol. III, p. 1536), the only portion thereof relating to alleged bias and prejudice.

[8]Appellants' Reply Brief, p. 35.

this regard. In the first place, the remarks of the Court were not directed solely to appellants, but on the contrary were "for the benefit of both sides". Secondly, the remark in question was of such character that no one could possibly complain thereof. It was merely an admonition, if it can be called such, that the parties and their counsel should confine themselves to truthful representations of fact, which should always be done, even without comment by the trial Court. Consequently, these remarks, far from being prejudicial, were merely informing respective counsel of their sworn duty.

The remarks of the trial Court complained of at pages 35, 36, 37, 38 and 39 are merely instances of the Court's insistence that the trial, which was then in its fourth and fifth days, proceed promptly and with dispatch, an insistence which was more than justified by the tactics adopted by appellants. Indeed, the trial Court showed remarkable restraint when some of the methods indulged in by appellants prior to the time in question are considered.

For instance, up to the third day of the trial, only one witness, appellant Ruddle, had testified. At the conclusion of his testimony in the middle of the day, appellants were entirely unprepared to proceed with any of their additional witnesses, so that in order to expedite the trial appellees were forced to present their evidence before appellants had concluded their case in chief.[9]

Instance after instance could be set forth wherein appellants indulged in most obvious dilatory tactics in an apparent endeavor to prolong the trial despite the Court's

[9]Tr. Vol. II, pp. 527-529.

proper insistence that it be concluded as speedily as possible, such as the appellants seeking to cross-examine one of appellees' witnesses on a matter not only not controverted but admitted by appellants,[10] but no useful purpose would be served in so doing and we will content ourselves with the following illustrations.

One of the facts developed by appellees was that not more than one or two per cent of the core ovens in use in the United States were electric ovens[11] and this fact appellants attempted to controvert. This was attempted in the first instance by improper questions based upon an unauthenticated and unproved letter and the Court advised appellants that they had better make some showing in response to that made by appellees.[12] In view of this warning, appellants claimed to have an "adequate, and a great deal of evidence on the subject of electric oven equipment" and proceeded to interrogate appellees' witness at great length on the basis of this unestablished letter,[13] during the course of which the following occurred:

> "The Court. I take it you are going to make a showing on these foundries.
>
> Mr. Hackley. I am going to make an effort to.
>
> The Court. What do you mean by 'effort'?
>
> Mr. Hackley. We have one man in San Francisco who is familiar with some of these plants, and we are trying to get a man from the east who is familiar with the rest of them before this trial closes, for the purpose of testifying in rebuttal to this testimony that we have heard here."
>
> (Tr. Vol. II, p. 772.)

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[10]Tr. Vol. II, p. 774.
[11]Tr. Vol. II, pp. 697, 698.
[12]Tr. Vol. II, p. 765.
[13]Tr. Vol. II, pp. 765-773.

Yet, despite the Court's statement and despite appellants' promise so to do, no such witness nor any witness was produced by appellants in rebuttal.

Under such circumstances can it be said that the trial judge was unreasonable if at times he became impatient, if it can be considered that he did, with such tactics? We submit not.

In view of well settled law that remarks indicating irritation at dilatory tactics are not sufficient upon which to base an assignment of bias and prejudice,[14] we shall not labor this point further. However, there are two circumstances set forth in Appellants' Reply Brief which in fairness to the trial judge should be explained.

The first of such examples is that set forth on pages 39-43 of Appellants' Reply Brief in which some complaint is made of the fact that the Court interrupted appellants' examination of one of appellees' employees and "listened to unsworn statements" of Mr. Dietert, appellees' expert on core-oils. Although as the trial judge remarked: "This sort of procedure is not known in our Federal Courts",[15] if there was any error in the Court's actions at this point it was subsequently cured when Mr. Dietert was carefully examined on direct examination. He there repeated in quite some detail the statements theretofore made by him in

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[14]"Reasons or comments of the judge in making judicial rulings do not constitute personal prejudice. Neither irritation upon the part of the judge nor comments upon the judicial tactics of a party or his counsel are sufficient to show personal prejudice, whether such comments be discreet or indiscreet." (*United States v. 16,000 Acres of Land, etc.*, 49 Fed. Supp. 645, 650.)

See also: *Refior v. Lansing Drop Forge Co.*, 124 Fed. (2d) 440, 444 (CCA 6).

[15]Tr. Vol. II, p. 680.

response to the Court's questions[16] and was extensively cross-examined in regard thereto.[17] Under such circumstances we shall not take the time to point out how appellants, by their actions and tactics, provoked the trial judge into making the inquiries of Mr. Dietert complained of.[18] Obviously under the circumstances noted above there is a complete lack of merit in appellants' complaint in this connection.

The only other instance worthy of mention is appellants' contention that the trial judge was not impartial because of the alleged inconsistent rulings set forth on page 44 of Appellants' Reply Brief. In this contention appellants are in error as the record will disclose. Appellants' complaint in this connection seems to be that the trial Court refused to admit certain evidence introduced by appellants, namely that of witnesses Anaclerio and Goth, on the ground that such testimony was the result of *ex parte* tests, yet subsequently admitted somewhat similar evidence produced by appellees. As is apparent from the record, the Court originally sustained appellees' objection on the grounds above noted, but later changed the ruling and stated that it was all going in subject to a motion to strike.[19] When appellees offered testimony which appellants believed to be of the same character as that previously offered by them the following occurred:

> "Mr. Hackley. If your Honor please, I object on the ground that it purports to cover ex parte tests and we had here this morning the objection from our

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[16] Tr. Vol. II, pp. 697-698.
[17] Tr. Vol. II, pp. 762-773.
[18] See Tr. Vol. II, p. 676.
[19] Tr. Vol. II, p. 610.

opponents here on that very same score as to tests which were performed by us—examples of those tests which were brought in——

The Court. You got it in the record.

Mr. Hackley. *Subject to a motion to strike.* May this be admitted with the same understanding?

The Court. *This will be admitted the same way.*"
(Tr. Vol. II, p. 702.)

And it was during the testimony of this witness that the offer was made referred to on page 44 of Appellants' Reply Brief. Consequently it is apparent that, contrary to appellants' assertion, the ruling of the trial Court followed the *same* procedure as to both appellants' and appellees' testimony in this connection.

From the foregoing it is quite apparent that appellants' belated and manifestly unfair charges of bias and prejudice on the part of the trial judge are wholly without foundation and completely lacking in merit and should not be considered by this Court.

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## II. REPLY TO MISCELLANEOUS POINTS IN APPELLANTS' REPLY BRIEF.

Although Appellants' Reply Rrief continues the practice of dissimulation with respect to the questions involved, this we believe has been sufficiently exposed in our former brief. The other arguments raised for the first time in Appellants' Reply Brief find complete answers in the record, as we shall now point out.

Commencing at page 5 of their reply brief, appellants urge that appellees are "blowing hot and cold" with re-

spect to work done by them on the albino-asphalt linseed blend core oils. In short appellants' contention is that because appellees allegedly charged, as part of the sums expended by them in their attempt to produce a successful core oil from Ruddle's useless product,[20] work done by them on other and entirely different oils, it necessarily follows that Ruddle's sodium silicate core oil and the albino-asphalt linseed blend core oil are one and the same thing, and both come within the terms of the contract in question. Not only is this a non-sequitur but the record facts do not support appellants' contentions.

For example, on page 10 of their reply brief appellants state that the reports of appellees (exhibits herein) disclose that "substantially all of the time from April, 1938" appellees "were engaged in work which led to the production of the" albino-asphalt linseed blend core oils. This statement is directly contrary to the fact. The first reference in the exhibits to *any* core oil not containing sodium silicate is *March 31, 1939,*[21] approximately one year after the contract in controversy was signed. Prior to that date hundreds of pages of exhibits are devoted to reports on sodium silicate core oils exclusively.

However, this same notebook shows that Dr. Wright, *after* March 31, 1939, continued to work on sodium silicate core oils up to as late as *July 10, 1939.*[22]

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[20]Defendants' Exhibit BBB, Tr. Vol. IV, p. 1916.

[21]Wright's Notebook, p. 96, Plaintiffs' Exhibit 52(a), not reproduced herein.

[22]See references to sodium silicate core oils in Plaintiffs' Exhibit 52(a), pp. 105-107, 113-115, 123, 127, 129, 142, 145, 146, 152, and 191-195, not reproduced herein.

In addition we have Dr. Wright's unequivocal testimony that:

> "I attempted to produce a stable mixture of water glass, or sodium silicate solution, and asphalt emulsion, and *that occupied my time from the beginning of my work at Shell Development, which was in August, 1938, up to about June, 1939.*"
> (Tr. Vol. II, p. 650.)

Under those circumstances, therefore, appellees were entirely justified in charging to work done on Ruddle's sodium silicate core oil, as "an approximation",[23] Dr. Wright's full time from August, 1938, to May, 1939.

Practically the same situation exists in connection with Mr. Spiri, whose time was likewise charged as an approximation to work on sodium silicate core oils. The first time *any* core oil *not* containing sodium silicate is mentioned in his reports occurs in Exhibit MM,[24] test 85, page 36, dated April 5, 1939. Only 11 out of the 112 tests referred to in this exhibit are with core oils not containing sodium silicate.[25]

The references on Defendants' Exhibit LL, pages 15, 21, 30, 36, 65 and 66[26] indicate that sodium silicate core oils were being tested by Mr. Spiri during May, 1939, and this is confirmed by Defendants' Exhibit WW, dated May 24, 1939, which reports on experiments attempting to eliminate defects in carbon black sodium silicate core oils,[27] and Defendants' Exhibit XX, dated June 6, 1939.[28]

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[23]Tr. Vol. II, p. 905.
[24]Not reproduced herein.
[25]See Defendants' Exhibit YY, p. 2, not reproduced herein.
[26]Not reproduced herein.
[27]Tr. Vol. IV, pp. 1880, 1881.
[28]Tr. Vol. IV, p. 1901.

Therefore, appellees are not "blowing hot and cold" in charging those men's time against the unsuccessful Core-Min-Oil project, and there is nothing in so doing that is inconsistent with the position that the albino-asphalt linseed blend core oils are not within the terms of the contract in suit.

Under the heading "Confidential Relationship" on page 17 of their reply brief, appellants again maintain that appellees violated paragraph 23 of the contract in suit by the circularizing of Plaintiffs' Exhibits 53 and 54. This contention is so absurd that we shall not waste much time in discussing it. There are two answers to appellants' contentions, either one of which is conclusive.

First: The report complained of does not describe the "formula of Core-Min-Oil" whatever it may be or its "method of manufacture" which is the prohibition contained in paragraph 23 of the contract.

Second: The parties to whom this report and letter were sent were not "unlicensed third parties" within the meaning of the paragraph above referred to. In this connection appellants complain in particular of a Mr. Van Eyck and Mr. Pyzel. These two gentlemen, in addition to each of the other parties listed, are connected with the appellee Shell Oil Co. in one manner or another.[29] Therefore, the report not containing the formula for Core-Min-Oil or its method of manufacture and not being forwarded to any unlicensed third parties, it cannot logically be contended that appellees have in any manner violated paragraph 23 of the contract in suit.

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[29]Tr. Vol. II, pp. 665, 669-671.

In attempting to strain the language of paragraph 2 of the contract in question to cover core oils other than Core-Min-Oil as defined in said contract, appellants again resort to a distortion of the facts. For example on page 23 of their reply brief they state:

> "Plaintiffs are not fully informed as to what may be pending in applications for patent filed by Shell Oil on the modified forms of Core-Min-Oil, but can point to the Anderson Patent, Exh. 57, as a 'later patent', covering these modified formulations, thereby bringing the modified forms within the diligence clause."

In the first place, in so far as this record is concerned, and it is a fact, appellants do not have any pending applications for patents on the albino-asphalt linseed blend core oils, and therefore whether this paragraph of the contract is construed as contended for by appellants on page 23 of their reply brief, or construed as we contend it must in our former brief[30] is immaterial.

In the second place, the "later patent" referred to by appellants in the quotation above referred to, being the Anderson patent,[31] has absolutely no relation whatsoever to core oils or "other compositions for foundry use", such as specified in the contract. Quite the contrary. This patent is entitled "Translucent Petroleum Plastics" and the entire disclosure as well as the claims thereof are directed to plastics having for their purpose markings on highways, for roofs, paints and like material. In passing it is worthy of observation to note that the application

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[30]Brief for Appellees, pp. 11-18.
[31]Plaintiffs' Exhibit 57, Tr. Vol. IV, p. 1757.

for this patent was filed on January 21, 1938, or approximately three months prior to the execution of the contract in controversy.

The last point which we feel needs but little comment is the unwarranted attack made by appellants on appellees' witness Dietert.[32] We will not indulge in any controversy with appellants as to the value and weight to be attached to his testimony, but are satisfied to leave that to the good judgment of this Court, satisfied that it will find him to be a wholly qualified expert on the subject of core oils with a vast amount of technical and practical background and a witness whose testimony, in the main uncontroverted, is entitled to considerable weight.

Appellants apparently criticize Mr. Dietert's testimony because, as they say, there is "an unreconciled conflict" between his testimony and that given by two of their witnesses named Anaclerio and Goth. Appellants also state that these two gentlemen, core-makers employed by the Macauley Foundry, testified that "Core-Min-Oil was a highly successful, extremely desirable, and superior core oil to Houghton oil and linseed oil, popular market products".[33] We doubt that the substance of the testimony of these two witnesses is as stated, but in any event it is a fact that Ruddle's core oil praised so highly by two of Macauley's core-makers was never used commercially by that foundry. Mr. Goth's testimony in that connection is as follows:

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[32]Appellants' Reply Brief, pp. 12-14, 25.
[33]Appellants' Reply Brief, p. 33.

"Q. You never attempted to use Mr. Ruddle's core oil in the regular production operations at the Macauley Foundry?

A. No; that was all just test work."

(Tr. Vol. II, pp. 590, 591.)

while Mr. Ruddle testified:

"Q. Did the Macauley Foundry ever use your Core-Min-Oil in commercial operations?

A. No, sir.

* * * * * * *

Q. Did any foundry that you know of ever use your Core-Min-Oil in commercial operations?

A. No, they did not."

(Tr. Vol. I, p. 475.)

Naturally a question arises as to why this so-called highly successful, extremely desirable and superior core oil was not used in any commercial operations by the Macauley Foundry nor in any other foundry, and we submit the answer is found in Mr. Dietert's testimony where he said that Core-Min-Oil had no commercial utility and could not be successfully or at all employed in commercial foundry operations.

Dated, San Francisco,
February 9, 1944.

Respectfully submitted,

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